

SERVED: November 24, 1992

NTSB Order No. EA-3734

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-9943
v.)	
)	
ROBERT W. SIMONTON,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from an initial decision of Administrative Law Judge Jimmy N. Coffman, issued orally at the conclusion of an evidentiary hearing held on April 3, 1990.¹ By that decision, the law judge affirmed the Administrator's determination that respondent had violated sections 91.5 and 91.9

¹An excerpt from the transcript containing the initial decision is attached.

of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) in connection with a flight conducted on February 16, 1988.² In addition, the law judge sustained a 45-day suspension of respondent's airline transport pilot (ATP) certificate which had been ordered by the Administrator for such alleged FAR violations.

In the order of suspension (which served as the complaint), the Administrator alleged the following:

- "1. You are the holder of Airline Transport Pilot certificate No. 1901800.
2. On February 16, 1988, you acted as pilot in command of civil aircraft N407PE, a Boeing Model 737 being operated as Continental Airlines Flight 803 from Newark, New Jersey, to Bradley International Airport, Windsor Locks, Connecticut.
3. The center fuel tank gauge had been placarded as inoperative and the aircraft maintenance log book cover for N407PE had been placarded as follows:
 Do not put any fuel in the center tank.
 Center tank deactivated due to leaking.
 Do not fill. Flight crew is required
 to operate center tank boost pumps
 periodically to pump out any
 residual fuel coming from wing tank
 surge tanks.
4. Flight 803 was ramp inspected by inspectors of the Federal Aviation Administration upon arrival at

²FAR § 91.5, which has since been recodified as § 91.103, provides in relevant part:

"§ 91.5 Preflight action.

Each pilot in command shall, before beginning a flight, familiarize himself with all available information concerning that flight. . . ."

FAR § 91.9, which has since been amended and recodified as § 91.13(a), read as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

Windsor Locks and you expressed a lack of knowledge of the placarding and its requirements.

5. You failed to familiarize yourself with all available information concerning Flight 803 before beginning that flight.

6. Your operation of an aircraft in the manner and

under the circumstances described above was

careless so as to endanger the lives and

property of others."

Respondent raises several issues in connection with his appeal. First, he asserts that the Administrator's complaint should have been dismissed as not timely filed.³ In this regard, respondent maintains that the Administrator failed to comply with Rule 31(a) of the Board's Rules of Practice because more than 5 days elapsed between the time he served the Administrator with his notice of appeal and the time the complaint was filed.⁴ Insofar as the substance of the Administrator's charges are

³Respondent filed a motion to dismiss the complaint on such grounds in March 1989. That motion was subsequently denied by Administrative Law Judge Joyce Capps, to whom the case had initially been assigned, on April 18, 1989. Several months later, the case was reassigned to Judge Coffman.

⁴Rule 31(a), which is codified as 49 C.F.R. § 821.31(a), provides as follows:

"§ 821.31 Complaint procedure.

(a) Filing, time of filing, and service upon respondent. The order of the Administrator from which an appeal has been taken shall serve as the complaint. The complaint shall be filed by the Administrator with the Board within 5 days after the notice of appeal has been filed upon the Administrator. The complaint shall be accompanied by the Administrator's proof of service upon respondent."

concerned, respondent asserts that the evidence of record is insufficient to establish the FAR violations alleged. He further contends that, even if the Administrator's charges can be found to have been substantiated, the imposition of a 45-day suspension of his ATP certificate is too harsh a sanction for such FAR violations.

The Administrator has submitted a reply brief, in which he urges the Board to affirm the initial decision.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that respondent's appeal should be denied, and the Administrator's order of suspension and the law judge's initial decision should be affirmed.

With respect to the procedural issue raised on appeal, the Board finds no merit in respondent's contention that the Administrator's complaint should have been dismissed. In this regard, we note the following chronology of pertinent events:

January 31, 1989: The Administrator issues his order suspending respondent's ATP certificate.

February 7, 1989: Respondent files a notice of appeal with the Board's Office of Administrative Law Judges and serves the Administrator with a copy thereof by mail.

February 10, 1989: The Administrator receives that copy of respondent's notice of appeal.

February 14, 1989: The Administrator files a copy of his order of suspension as the complaint in this case.

While respondent argues that the Administrator did not comply with Rule 31(a) because the complaint was filed more than

5 days after his notice of appeal was served--i.e., mailed to the Administrator--we must point out that we have previously construed that rule as directing the Administrator to file the complaint within 5 days of his receipt of the notice of appeal.⁵

As the Administrator filed his complaint within that time frame, the Board finds no error in the denial of respondent's motion to dismiss.⁶

Turning to substantive matters, the Board believes that the record contains sufficient evidence to sustain the FAR violations alleged by the Administrator. In this regard, we note that it has been acknowledged that the aircraft's center fuel tank gauge bore an "inoperative" placard. At the hearing, both of the aviation safety inspectors who conducted the Windsor Locks ramp inspection testified that respondent, when initially asked why that placard was there, replied that it was because the gauge--rather than the fuel tank--was inoperative.⁷ One of those

⁵Administrator v. Kortum, 3 NTSB 1031, 1032 & n.3 (1978). Such an interpretation of Rule 31(a) stems from the fact that, under that rule, the 5-day time period for filing the complaint begins not when the Administrator is "served" with respondent's notice of appeal, but when that document is "filed upon" him.

⁶We note that respondent has, in his appeal brief, suggested that the Hooper case decisions (Hooper v. NTSB, 841 F.2d 1150 (9th Cir. 1988), and, on remand, Administrator v. Hooper, NTSB Order EA-2781 (1988)), should be applied to require dismissal of late-filed complaints in the absence of a showing of good cause for such lateness. In view of our determination that the complaint in this case was timely filed, we need not reach the question of whether the good cause standard set forth in Hooper, which concerned rules governing appeals of initial decisions to the Board, should be applied to Rule 31(a) as well.

⁷The inspectors discovered the fuel tank inoperative placard on the cover of the aircraft maintenance log book (a photocopy of

inspectors, who continued questioning respondent in Continental's operations break room shortly thereafter, also noted that, during such questioning, respondent displayed no awareness of either the nature of the fuel tank's defect or what remedial steps were necessitated because of that problem. That inspector further related that respondent informed him that the center tank fuel boost pumps had not been operated during the flight from Newark to Windsor Locks and did not indicate that respondent provided any reason for this. Such evidence amply supports a finding that respondent was not sufficiently familiar with his aircraft before commencing the flight in question⁸ and that he, therefore, committed the FAR violations alleged.⁹ Although respondent controverted much of the above cited evidence during the course of his testimony, the law judge found the inspectors' testimony

(..continued)
which is Ex. A-1) subsequently during the course of the ramp inspection.

⁸In this regard, we reject respondent's assertion (see Respondent's Br. 11-12) that information obtained subsequent to the completion of a flight cannot provide a basis for a determination that an airman was unfamiliar with flight-related data prior to takeoff. The adoption of such a view would not only require the exclusion of relevant and probative information in cases such as this, but could also serve to compromise air safety by effectively limiting the Administrator's capacity to investigate and prosecute potential FAR violations.

⁹In addition to supporting a § 91.5 violation, the above cited evidence tends to bolster a finding of carelessness on the part of respondent in the operation of his aircraft, in violation of § 91.9. Moreover, the establishment of a § 91.5 violation here is sufficient to warrant a finding of a § 91.9 violation on a derivative basis. See, e.g., Administrator v. Cory, NTSB Order EA-2767 at 6 (1988); Administrator v. Dutton, NTSB Order EA-3204 at 6-7 (1990); Administrator v. Thompson, NTSB Order EA-3247 at 5 n.7 (1991).

to be more credible,¹⁰ and we will not disturb such a finding on appeal.

Regarding the issue of sanction, while respondent has contended the imposition of a 45-day suspension of his ATP certificate is unduly harsh, the Board does not believe that such a suspension is unreasonable in light of the FAR violations established. Consequently, we will not reduce the suspension ordered by the Administrator and sustained by the law judge in this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 45-day suspension of respondent's ATP certificate shall begin 30 days from the date of service of this order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member LAUBER did not participate.

¹⁰See Tr. 100.

¹¹For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).